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Supreme Court, U.S.
FILED
JUN 5 1992
OFFICE OF THE CLERK

Nos. 91-1619 and 91-1620

In the Supreme Court of the United States

OCTOBER TERM, 1991

ANTHONY VULPIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ANGELO PACCIONE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

RICHARD A. FREIDMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners were denied a fair trial by the use of an anonymous jury.

2. Whether petitioners' fraud involved the obtaining of money or property within the scope of the mail fraud statute, 18 U.S.C. 1341.

3. Whether the district court erred by admitting certain evidence pursuant to Fed. R. Evid. 404(b).

4. Whether the district court correctly determined petitioner Vulpis's sentence under the Sentencing Guidelines.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A60)[1] is reported at 949 F.2d 1183. The opinions of the district court denying a motion to dismiss the

[1] References to "Pet. App." are to the appendix to the petition in No. 91-1619.

indictment (Pet. App. B1-B79), denying a motion for judgment of acquittal (Pet. App. C1-C76), and regarding sentencing (Pet. App. D1-D22) are reported at 738 F. Supp. 691, 749 F. Supp. 784, and 751 F. Supp. 368, respectively.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1991. A petition for rehearing was denied on January 10, 1992. Pet. App. E1-E2. The petitions for a writ of certiorari were filed on April 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of participating and conspiring to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity (Counts 1-2), in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) statute, 18 U.S.C. 1962(c) and (d), and five counts of mail fraud (Counts 5-9), in violation of 18 U.S.C. 1341. Petitioner Paccione also was convicted of an additional mail fraud offense (Count 12). Petitioners Vulpis and Paccione were each sentenced to 151 months' imprisonment to be followed by three years' supervised release. With respect to forfeitures, fines, and restitution, petitioners entered into a court-approved agreement to pay the government $22 million. Pet. App. A13-A15.

1. During 1988, Vulpis and Paccione controlled much of the private trash carting business in the New York City boroughs of Brooklyn and Queens. Paccione was the president and majority shareholder of petitioners August Recycling, Inc., National Carting,

Inc., and Stage Carting, Inc. Vulpis owned 50% of petitioners Rosedale Carting, Inc., and Vulpis Brothers, Ltd. Together, those entities had an income of approximately $23 million per year. Between May and September 1988, petitioners illegally operated a full-scale commercial dump on a 110-acre site called Arlington Yard on Staten Island, 72 acres of which belonged to CSX Realty Corporation (CSX). Although CSX had not given petitioners permission to use its land, trucks filled with rotting garbage, construction and demolition debris, medical waste, and asbestos dumped their loads into recently excavated pits at the site. When the pits were filled, more waste was heaped on, creating a plateau 20-30 feet high. The mound was then covered with a thin layer of the "clean" dirt that had been excavated to create the pits, so that the dump appeared to consist entirely of clean fill.[2] Pet. App. A4-A7.

In June 1988, Paccione wrote to CSX, falsely reassuring it that no dumping was occurring on CSX land. Later, petitioners ignored an injunction obtained by CSX to halt the dumping. In July 1988, inspectors of the New York City Department of Sanitation (CDOS) found garbage in petitioners' dump. Petitioners falsely assured the CDOS inspectors that the dump did not contain any prohibited waste and that a comprehensive sampling protocol was being followed. By dumping garbage at the Arlington Yard site, petitioners violated the requirement that all waste other than clean fill that is disposed of within New York City be dumped at a City-owned landfill. They also avoided the payment of fees to the City for

[2] Clean fill consists of earth, ashes, dirt, concrete, rock, gravel, stone, or slag, and may be used to upgrade building sites. Pet. App. A5.

dumping each cubic yard of waste. Before the Arlington Yard dump was shut down by the New York State Department of Environment Conservation (SDEC), petitioners illegally dumped at least 550,000 cubic yards of refuse and thereby avoided paying the City some $4,625,000 in dumping fees. Pet. App. A5-A9.

Petitioner A&A realized approximately $2.6 million of income from the fees it charged to companies to dump their garbage. Paccione received $315,610 from those fees; Vulpis received $286,728. CSX's property, which had an estimated value of $20 million for residential development before petitioners' crimes, lost its potential for that use and required a clean-up costing an estimated $15 million. Pet. App. A9.

During approximately the same period, petitioners and others engaged in an unlawful scheme with respect to the disposal of infectious medical waste. They established a company called New York Environmental Contractors, Inc., which advertised itself, through the mail and otherwise, as being properly licensed, ethically motivated, and fully competent to engage in the heavily regulated disposal of infectious medical waste. In fact, the company operated on permits that were bogus or obtained by forgery and fraud. It unlawfully stored, transported, and disposed of medical waste, subjecting the persons who generated that waste to legal sanctions under New York's regulatory scheme for medical-waste disposal. Several of those persons or entities were required to pay civil penalties for the unlawful disposal of medical waste. The company also defrauded its customers of the substantial disposal fees charged by petitioners to dispose of their medical waste. Pet. App. A9-A13.

2. a. On the government's motion, the court imposed procedures designed to secure the anonymity of

the jury empaneled to hear the case. The court limited voir dire to prevent disclosure of the names, home addresses, and places of employment of the jurors. It also required, during trial, that the jurors be kept together during lunch recesses and accompanied by a United States Marshal. At the end of each trial day, the jurors were taken to an undisclosed central location from which they could go home. Petitioners consented to most of those procedures on the condition that the jurors be carefully instructed that the procedures were intended to protect them against intrusion by the media, but they objected that the nondisclosure of the jurors' names and employers would deprive them of a fair trial. Pet. App. A16-A17.

b. During trial, Vulpis's principal defense was that he had no intention to operate the Arlington Yard dump illegally and that any illegal dumping at the site was due to accident or mistake. In its rebuttal case, the government sought to show that Vulpis was aware of the illegality of his operation. Over Vulpis's objection, the government was allowed to introduce evidence that Vulpis offered SDEC officers bribes for them not to close the facility. SDEC officer Baker testified that when he told Vulpis that he was operating illegally and risked penalties of $25,000 per day, Vulpis responded, "I'm losing $75,000 a day every day the place is closed. How about $100,000, you just go away." Similarly, SDEC officer Milewski testified that on the same day Vulpis told him he was "losing approximately $80,000, and how about $50,000." Pet. App. A33.

c. On October 3, 1990, the district court sentenced Paccione and Vulpis to 151-month terms of imprisonment. In calculating the applicable sentencing range, the district court applied Sentencing Guidelines § 2Q1.2, which deals with environmental offenses, to

find an offense level of 26. The court also used the multiple-count rules found in Guidelines § 3D1.2 to increase the offense level by two levels to 28. Pet. App. D10-D14. Alternatively, the district court found that the provision of the Guidelines for mail fraud, Sentencing Guidelines § 2F1.1, did not adequately take into account the massive environmental harm caused by petitioners' scheme to defraud and that an upward departure from the mail fraud Guidelines offense level, to reach offense level 28, would be justified under the circumstances. Pet. App. D10 n.4.

The district court then further departed upward from level 28 by four levels: it increased the sentencing range by two levels based on the combination of ingredients of more than minimal planning, multiple victims of the scheme to defraud, and violation of a court order; and it increased the sentencing range by another two levels after finding that petitioners entered into a forfeiture agreement without any intention of making payment.[3] Pet. App. D16-D19. The resulting offense level of 32 yielded a sentencing range of 121-151 months. *Id.* at D19. The district court sentenced Paccione and Vulpis at the top of that range due to "the tremendous harm [that they] caused

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[3] After the case was submitted to the jury but before the verdict, the parties entered into a forfeiture agreement. That agreement removed from the jury any issue of RICO forfeiture and provided that Paccione, Vulpis, and the corporate petitioners, if convicted of the RICO offenses, would be jointly and severally liable to the government for $22 million, in satisfaction of forfeiture, court-imposed fines, and restitution. The agreement established a periodic payment schedule and required payment in full within 90 days. The agreement was approved by the district court on the same day as the jury's verdicts of conviction, June 8, 1990. Petitioners made none of the payments required under that agreement. Pet. App. D59-D63.

to both individuals, agencies and our environment." *Id.* at D21.

3. The court of appeals affirmed. Pet. App. A1-A60. First, the court rejected petitioners' argument that the use of an anonymous jury deprived them of a fair trial. Relying on extensive Second Circuit precedent dealing with the use of anonymous juries, the court stated that a district court "should not order the empaneling of an anonymous jury without (a) concluding that there is strong reason to believe the jury needs protection, and (b) taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected." *Id.* at A17, citing *United States* v. *Tutino*, 883 F.2d 1125, 1132 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990); *United States* v. *Persico*, 832 F.2d 705, 717-718 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); *United States* v. *Thomas*, 757 F.2d 1359, 1365 (2d Cir.), cert. denied, 474 U.S. 819 (1985). The court of appeals found that those standards were met here. Pet. App. A18-A20.

As to the need for anonymity, the court of appeals determined that the government's submissions were sufficient to justify the district court's conclusion that the jurors' identities should be protected against disclosure. The government had submitted an affirmation stating that Fred E. Weiss, an owner of a portion of the Arlington Yard property and a co-defendant in this case, had been murdered in circumstances that strongly suggested a connection to the indictment and to certain of the petitioners. Moreover, the government submitted in camera information from a confidential reliable source that Paccione was a "made" member of the Gambino Crime Family, that Vulpis had strong ties to organized crime, that various persons had been threatened by Vulpis and

his associates, and that a government witness had received a middle-of-the-night anonymous telephone call telling him that he would be safe so long as he "remembered nothing." Pet. App. A18-A19.

As to the precautions taken to avoid prejudice, the court of appeals noted that petitioners did not question the adequacy of the voir dire in the selection of the jury. Pet. App. A19. The court also found that the explanation given to the jury for the procedures—to avoid media attention—prevented prejudice to petitioners. *Id.* at A19-A20. Moreover, although some jurors were concerned about possible threats by petitioners, the court observed that the combination of verdicts of acquittal and conviction after long deliberation "strongly indicates that those measures did not induce any lack of objectivity." *Id.* at A20.

Second, the court of appeals rejected petitioners' argument that the mail fraud counts failed to charge a scheme for "obtaining money or property" within the meaning of the mail fraud statute, 18 U.S.C. 1341. Pet. App. A20-A29. Applying the rule of *McNally* v. *United States*, 483 U.S. 350, 360 (1987), that Section 1341 is "limited in scope to the protection of property rights," the court found a clear allegation and proof of the deprivation of property to support each of the mail fraud convictions. The court explained that Counts 5-7 involved petitioners' scheme to defraud New York City of "revenues from licensing fees and dumping fees to be derived from the lawful disposal of waste materials at the City-owned landfill," Pet. App. A24; Counts 8 and 9 charged petitioners with a scheme to defraud CSX of the value of its Arlington Yard property, *id.* at A25-A26; and Count 12 charged petitioners with defrauding doctors of the high fees they paid

petitioners for disposal of their infectious medical waste, *id.* at A26-A29.[4]

Third, the court of appeals rejected Vulpis's claim that the district court erred in admitting, during the government's rebuttal case, evidence that Vulpis had offered SDEC officers bribes. The court held that Vulpis's attempt to bribe a law enforcement official was relevant to rebut his defense that he did not intend the Arlington Yard operations to violate the law and that the dumping operation was a result of accident or mistake. The court found no abuse of discretion in the district court's weighing of the prejudice and relevance of that evidence under Fed. R. Evid. 404(b). Pet. App. A32-A35.

Finally, the court of appeals upheld the 151-month sentences of incarceration imposed on petitioners Vulpis and Paccione. Pet. App. A40-A60. The court noted that the question whether the district court should have applied the Sentencing Guidelines provision applicable to fraud or that applicable to environmental offenses was complicated by apparently conflicting directions within the Guidelines and

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[4] With respect to one of the mail fraud offenses charged as a predicate act in the RICO counts, the court of appeals found that the allegations and proof failed to encompass conduct within the mail fraud statute. Pet. App. A30-A31. That act alleged that petitioners sought to defraud the State of a license to transport medical waste. The court noted that Second Circuit precedents held that a license is not "property" within the scope of the mail fraud statute. *Id.* at A30; see *United States* v. *Schwartz*, 924 F.2d 410, 417 (2d Cir. 1991); *United States* v. *Novod*, 923 F.2d 970, 973 (2d Cir. 1991). Although that predicate act was invalid, the court held that its invalidity did not require reversal of the RICO convictions. The jury's special verdict showed that only Paccione was found to have committed that predicate act, and he was found to have committed eight other valid predicate acts. Pet. App. A30-A31.

changes to the Guidelines since the 1988 version that was in effect on the date of petitioners' offenses. Pet. App. A43-A47. The court found it unnecessary to decide that question, however, because it upheld the district court's alternative rationale that, even if the fraud provision were applicable, the district court would depart upward to reach the same offense level as achieved by applying the environmental crimes provision. *Id.* at A47. Likewise, while the court of appeals suggested that it agreed with petitioners' contention that the district court improperly applied the multiple-count rules to reach a base offense level of 28, the court again upheld the district court's alternative rationale that it would have departed upward to the same level. *Id.* at A47-A48.[5]

ARGUMENT

1. Petitioners contend (91-1620 Pet. 6-22) that the court of appeals improperly upheld the district court's decision to empanel an anonymous jury. They assert that the factual basis underlying the district court's order was inadequate and that the procedure "burdened the presumption of innocence" (91-1620 Pet. 12). That claim does not warrant this Court's review.

As petitioners acknowledge, an anonymous jury is permissible in cases in which there is a sufficient showing that the defendants may interfere with the jury's free deliberations. See 91-1620 Pet. 9-10. The standards to be applied in reviewing a trial court order empaneling an anonymous jury are well settled. As the court of appeals explained, an anonymous jury

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[5] The court of appeals also upheld the district court's two-level upward departure based on petitioners' entry into the forfeiture agreement with no intention of making the required payment, which the district court properly analogized to obstruction of justice. Pet. App. A48-A60.

ordinarily should not be empaneled unless "there is strong reason to believe the jury needs protection" and procedures are employed to minimize any risk of prejudice to the defendant. Pet. App. A17 (citing cases); see also *United States* v. *Vario*, 943 F.2d 236, 239-242 (2d Cir. 1991), cert. denied, 112 S. Ct. 882 (1992); *United States* v. *Maldonado-Rivera*, 922 F.2d 934, 971 (2d Cir. 1990), cert. denied, 111 S. Ct. 2858 (1991); *United States* v. *Scarfo*, 850 F.2d 1015, 1021-1026 (3d Cir.), cert. denied, 488 U.S. 910 (1988). Petitioners do not contend that there is a conflict among the circuits with respect to those standards. Rather, they suggest (91-1620 Pet. 21-22) that this Court should grant review to clarify the standards for empaneling an anonymous jury. This Court has repeatedly denied certiorari in cases involving that issue,[6] and there is no reason for a different result here.

Nor did the court of appeals misapply the governing standards. The court correctly held that the district court had strong reason to believe that the jury needed protection.[7] The government provided information indicating that petitioners were involved in the murder of one of the participants in the offenses, that a government witness had been threatened to

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[6] See, *e.g.*, *Tutino* v. *United States*, 493 U.S. 1081 (1990); *Persico* v. *United States*, 486 U.S. 1022 (1988); *Fisher* v. *United States*, 474 U.S. 819 (1985).

[7] Petitioners quarrel with that conclusion (91-1620 Pet. 14-16), but cite no authority indicating that the matters presented to the district court were insufficient to justify an anonymous jury. Moreover, the very things that petitioners say would warrant an anonymous jury—allegations of witness tampering, participation in a violent criminal organization, participation in violent crime (91-1620 Pet. 20)—were present here. See Pet. App. A18-A19.

prevent him from testifying truthfully, and that Vulpis and his associates had been involved in various instances of threatening activity associated with the case. Pet. App. A19. Petitioners err in contending (91-1620 Pet. 16-19) that it was improper for the district court to rely on an affidavit submitted by the government in camera. The need to protect grand jury secrecy, see *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 424-425 (1983), justifies the use of that process. Cf. *In re Sealed Case*, 832 F.2d 1268, 1274 (D.C. Cir. 1987); *In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982).

Moreover, as the court of appeals explained, the district court crafted procedures to minimize the risk of prejudice. The court conducted voir dire of the jurors, the adequacy of which petitioners have never challenged. The court also informed the jury that the precautions taken to conceal the jurors' identities and addresses were for the purpose of insulating them from media attention. In light of those precautions, petitioners have failed to show that the anonymous jury technique burdened the presumption of innocence.[8]

2. Petitioners claim (91-1619 Pet. 24-38; 91-1620 Pet. 22-35) that the mail fraud offenses of which they were convicted did not involve the obtaining of "money or property" within the meaning of 18 U.S.C. 1341. Their principal argument is that, since there was no law requiring them to dump their garbage in New York City, the government failed to prove that the City was deprived of revenue from their operation

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[8] As the court of appeals noted, the jurors actually acquitted petitioners on particular counts, thus confirming that the jury's "objectivity" was not compromised by their anonymity. Pet. App. A20.

of an illegal dump on Staten Island. Petitioners' claim is without merit.

In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court held that the "money or property" language of the mail fraud statute does not encompass a scheme to deprive the citizenry of honest government. Since *McNally*, numerous courts have held that a scheme to deprive a government of revenue comes within the "money or property" limitation of the statute. See, *e.g.*, *United States* v. *Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991) (scheme to deprive State of income taxes), cert. denied, 112 S. Ct. 1162 (1992); *United States* v. *Dray*, 901 F.2d 1132, 1141-1142 (1st Cir.) (scheme to evade required fees for municipal building permits), cert. denied, 111 S. Ct. 245 (1990); *United States* v. *Porcelli*, 865 F.2d 1352, 1359-1362 (2d Cir.) (same re state sales taxes), cert. denied, 493 U.S. 810 (1989); *United States* v. *Gelb*, 881 F.2d 1155, 1162 (2d Cir.) (same re postal revenue from mass mailings), cert. denied, 493 U.S. 994 (1989).[9]

Contrary to petitioners' suggestion, their actions deprived the City of revenue even though, as a theoretical matter, they could conceivably have dumped their refuse outside of New York City and thereby avoided paying any municipal fees. Petitioners did not dump their refuse outside the City. Their scheme entailed dumping on land within the City. Having done so, petitioners were required to pay the City revenue by dumping in the City's own landfill. As the court of appeals observed, Pet. App. A25, the evidence showed that the City's revenues at its landfill "declined

[9] Moreover, in response to *McNally*, Congress amended the mail fraud statute to encompass schemes "to deprive another of the intangible right of honest services." 18 U.S.C. 1346. That amendment considerably reduces the importance of the "property" issue that petitioners present.

precipitously" during the course of petitioners' illegal operation. It was within the province of the jury to determine from the evidence that, but for petitioners' illegal dumping operation, much of the garbage illegally dumped at the Arlington Yard property would have been legally dumped in the City landfill, thus generating revenue for the City.[10]

Petitioners also argue (91-1620 Pet. 31-34) that the scheme to defraud customers who paid to dispose of medical waste and the scheme to defraud CSX of the value of its land by improperly dumping garbage on it did not defraud those victims of money or property. The court of appeals correctly rejected those arguments. The customers who paid to have medical waste disposed of were clearly defrauded of their money when petitioners dumped the waste in Arlington Yard; the customers "did not get what they paid for," and were exposed to civil liability for the improper disposal of medical waste. Pet. App. A29. And, as the court of appeals noted, the suggestion that CSX was not defrauded in its property rights when petitioners, without CSX's authorization, dumped tons of garbage on CSX land and caused CSX millions of dollars in damage, is "frivolous." *Id.* at A26.

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[10] Petitioners' suggestion (91-1619 Pet. 36) that the decision in this case conflicts with *United States* v. *Evans*, 844 F.2d 36 (2d Cir. 1988), is misplaced. *Evans* involved a scheme to deprive the government of the right to control the transfer of weapons, which the court of appeals thought was not a property right. This case, in contrast, involves depriving the government of revenues. In any event, an intracircuit conflict with *Evans* would not warrant this Court's attention. Nor is there a conflict with *Toulabi* v. *United States*, 875 F.2d 122, 125-126 (7th Cir. 1989), see 91-1620 Pet. 26 n.12, in which the defendant fraudulently caused the issuance of a taxi license, but did not deprive the government of fees.

3. Vulpis argues (91-1619 Pet. 38-43) that the district court erred by admitting evidence that Vulpis offered bribes to SDEC officers to prevent them from taking adverse action. Petitioners assert that the evidence was ambiguous about whether bribes were offered, and even the SDEC officers involved were not clear that an attempt at bribery was being made. Whatever petitioners' interpretation of this evidence, however, the district court did not abuse its broad discretion in allowing the jury to consider whether Vulpis was offering a bribe when he said to SDEC officer Baker, "How about $100,000, you just go away," and when he made a similar offer to SDEC officer Milewski.[11] Pet. App. A33. The admissibility of such evidence depends on whether its probative value outweighed its potential for unfair prejudice. *Id.* at A32-A34. The factbound question of whether that balance was properly struck in this case does not warrant review by this Court.

4. Finally, Vulpis argues (91-1619 Pet. 43-47) that the district court erred in calculating his offense level under the Sentencing Guidelines. He reiterates his claim that the court should not have referred to the environmental offense Guidelines provision in determining his offense level.

The court of appeals, however, did not affirm Vulpis's sentence by upholding the district court's

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[11] A reviewing court will not find error in the admission of evidence under Fed. R. Evid. 404(b) unless the district court clearly abuses its discretion. See, *e.g.*, *United States* v. *Allen*, 930 F.2d 1270, 1273 (7th Cir. 1991) ("clear abuse"); *United States* v. *Ayers*, 924 F.2d 1468, 1472 (9th Cir. 1991); *United States* v. *Geer*, 923 F.2d 892, 896 (1st Cir. 1991) (court will reverse only in "exceptional circumstances"); *United States* v. *Burk*, 912 F.2d 225, 228 (8th Cir. 1990) (court will reverse only if evidence had "no bearing on any of the issues involved").

reference to the environmental offense provision. Rather, the court of appeals upheld the district court's alternative rationale that a departure from the fraud Guidelines provision was warranted because the offense level it produced understated the seriousness of Vulpis's offense conduct in a manner not adequately taken into account by the Guidelines. Pet. App. A47. The determination of the courts below that a departure was appropriate, which petitioner does not contest,[12] makes it irrelevant whether the fraud or environmental sentencing provisions apply to petitioner. Under either approach, petitioner's sentence would have been the same. In any event, as the court of appeals noted, Pet. App. A44-A45, because pertinent aspects of the Guidelines have been amended since the time of petitioner's offense, the issue of whether the former Guidelines provisions permitted reference to the environmental offense provision is of no continuing importance.

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[12] Sentencing Guidelines § 5K2.0 provides that the "sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds 'that there exists an aggravating * * * circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.' " In formulating the punishment for mail fraud, the Guidelines take account of the value of the monetary loss caused by the scheme to defraud. As the court of appeals explained, however, "there is no indication that when it formulated punishments for mail fraud, the Commission took into account the possible causation of massive environmental damage such as that proven here." Pet. App. A47. In those circumstances, the district court did not abuse its discretion in its departure.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

RICHARD A. FREIDMAN
Attorney

JUNE 1992